The Attorney General's Advisory Committee *on*

Charge Screening, Disclosure,

The Honourable G. Arthur Martin, O.C., O.Ont., Q.C., LL.D.
Chair

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Advisory Committee
on

Charge Screening, Disclosure, and Resolution Discussions

Recommendations and Opinions

The Honourable G. Arthur Martin, O.C., O.Ont., Q.C., LL.D.
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Advisory Committee to the Attorney General on Screening of Criminal Charges, Resolution Discussions and Disclosure

RECOMMENDATIONS AND OPINIONS OF THE ATTORNEY GENERAL'S ADVISORY COMMITTEE ON CHARGE SCREENING, DISCLOSURE, AND RESOLUTION DISCUSSIONS

CHARGE SCREENING

The Threshold Test for Commencing or Continuing a Prosecution

1. The Committee recommends that for the purposes of a threshold test regarding the screening of charges by the prosecutor, the test of a "reasonable prospect of conviction" be adopted for all offences.

2. The review to determine whether the threshold test has been met should include an assessment of the probative value of the evidence, including some assessment of the credibility of witnesses.

3. The review to determine whether the threshold test has been met should include consideration of the admissibility of evidence. The threshold test will not be met where evidence necessary to the prosecution is clearly or obviously inadmissible.

4. The review to determine whether the threshold test has been met should include a consideration of any defences, for example alibi, that should reasonably be known, or that have come to the attention of the Crown.

5. The same threshold test applies for commencing, continuing, or discontinuing a prosecution.

The Threshold Test and the Public Interest

6. The Committee recommends that public interest factors should only be considered after the threshold test has been met, and then should only be used to refrain from commencing, or to discontinue a prosecution.

Various Public Interest Factors that May be Relevant

7. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the charge or charges that best reflect the gravity of the incident.

8. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should **not** consider any political consequences for the government flowing from the prosecution.

9. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the circumstances and attitude of the victim. The attitude of the victim is not, however, decisive.

10. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the entitlement of the victim to compensation, reparation, or restitution if a conviction is obtained.

11. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should **not** consider the status in life of either the accused or the victim.

12. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the need to maintain public confidence in the administration of justice, and the effect of the incident or prosecution on public order.

13. The Committee recommends that the agent of the Attorney General should take into account national security and international relations in determining whether a prosecution is in the public interest.

14. The Committee recommends that, in determining whether a prosecution is in the public interest, the agent of the Attorney General should consider the availability and efficacy of alternatives to prosecution.

15. The Committee recognizes that the factors specifically discussed above are not an exhaustive enumeration of the considerations that may be relevant to an assessment of the public interest in a prosecution.

The Threshold Test and Policies, Directives and Guidelines in General

16. The Committee recommends that guidelines regarding the threshold test and what factors are included in the term "public interest" should be published by the Attorney General.

17. The Committee recommends that directives from the Attorney General to his or her agents should be few and far between.

18. The Attorney General should instruct his or her agents through the use of guidelines, which formally permit the exercise of discretion in their application.

19. Such guidelines and the rare directives which may issue should not be taken into account by agents of the Attorney General until they are published or otherwise made known to the public.

Charge Screening in Ontario

20. The Committee recommends that there exist in Ontario a system of charge screening by agents of the Attorney General.

21. The Committee recommends that there exist in Ontario a system of post-charge screening by agents of the Attorney General.

22. The Committee recognizes the long standing tradition in Ontario of police consultation with the Crown in matters of difficulty at the pre-charge stage of the investigation. The Committee encourages this tradition of co-operative consultation to continue where, in the judgment of senior police officers, consultation is warranted. Where warranted, such consultation need not be limited to matters of evidence, but should also pertain to the various public interest factors that may affect the course of the prosecution apart altogether from the evidence.

The Mechanics of Post-Charge Screening

23. The Committee recommends that the Attorney General's agents should be required to conduct their post-charge review prior to setting a date for a preliminary hearing or trial.

24. The Committee recommends that the investigators should provide to Crown counsel for the purposes of screening charges, all information necessary to ascertain if the threshold test for conducting a prosecution has been met, and all information necessary to assess the impact of any relevant public interest factors in the prosecution. This material will necessarily include, but will not be

limited to, that which is required for disclosure.

25. The Committee recommends that the Attorney General require his or her agents to be duly diligent in making efforts to obtain all information that relates to a case for purposes of screening and disclosure.

DISCLOSURE

General Recommendations With Respect to Disclosure

Disclosure Recommendations Pertaining to Investigations

26. The Committee recommends that the Attorney General request that the Solicitor General issue a statement to all police officers emphasizing the importance of taking careful, accurate, and contemporaneous notes during their investigations. (The statement should emphasize that disclosure requirements after *Stinchcombe* cannot be thwarted by making less accurate or less comprehensive notes.)

27. The Committee recommends that, upon request, copies of relevant original notes should be disclosed, subject to editing or non-disclosure where the public interest requires it, including editing or non-disclosure, where necessary, to protect confidential informants, the existence of on-going investigations, and the integrity of police investigative techniques.

28. The Committee recommends that statements of suspects or accused persons taken at the police station or wherever such persons are detained, be video taped or audio taped, preferably video taped. It is recognized that this may not always be practical or technically feasible.

Ethical and Legal Obligations Relating to Disclosure

The Police

29. The Committee recommends that s. 1(c)(viii) of the Code of Offences, a Schedule to Regulation 791 under the *Police Services Act*, R.S.O. 1990 c. P-15, be amended to read as follows:

> *1. Any chief of police, other police officer or constable commits an offence against discipline if he is guilty of*
>
> *(c) NEGLECT OF DUTY, that is to say, if he,*
>
> *where a charge is laid fails to disclose to the officer in charge of*

the prosecution or the prosecutor any information that he or any person within his knowledge can give for or against any prisoner or defendant.

Crown Counsel

30. The Committee recognizes that it is a serious disciplinary offence for the Crown to fail to disclose to the defence as required.

31. The Committee recommends that it is inappropriate for Crown counsel to limit or refuse disclosure in a case, unless defence counsel agrees to limit a preliminary inquiry so as to ensure efficient use of court time. This does not preclude counsel from agreeing to shorten or waive a preliminary inquiry.

32. The Committee recommends that it is inappropriate for the Attorney General to withhold disclosure, unless defence counsel gives an undertaking not to share the information with his or her client.

Defence Counsel

33. The Committee acknowledges that, at present, there is no obligation upon the defence to disclose any part of its case before trial. The Committee makes no further recommendation in this respect.

34. The Committee is of the opinion that it is inappropriate for any counsel to give disclosure materials to the public. Counsel would not be acting responsibly as an officer of the Court if he or she did so.

35. The Committee is of the opinion that defence counsel should maintain custody or control over disclosure materials, so that copies of such materials are not improperly disseminated. Special arrangements may be made between defence and Crown counsel, with respect to maintaining control over disclosure materials where an accused is in custody, and where the volume of material disclosed makes it impractical for defence counsel to be present while the material is reviewed.

Disclosure and Summary Conviction Offences

36. The Committee recommends that the nature and extent of disclosure should not vary based on whether the charge was prosecuted by way of indictment, summary conviction procedure, or prosecuted under the *Provincial Offences Act.*

37. The Committee recommends that in all summary conviction matters under the *Criminal Code* which are commenced by a private complainant, the Crown should intervene to either withdraw the charge or to conduct the prosecution. If the Attorney General intervenes and conducts the prosecution, disclosure should be made in the same way as any other prosecution. Nothing herein is to be construed as precluding the Attorney General from assuming carriage of prosecutions under the *Provincial Offences Act* in appropriate cases, for example, under the *Environmental Protection Act.*

Other Recommendations

38. The Committee recommends that the Attorney General should require reasonable efforts from his or her agents to determine the sufficiency of disclosure. It is recognized that the obligation to provide disclosure is on-going.

39. The Committee recommends that all accused persons be advised of their right to disclosure, and where disclosure may be obtained, by written notice on all release forms or summonses.

40. As a general rule, the Committee is in favour of disclosure in writing.

Recommendations Relevant to a Proposed New Disclosure Directive

41. The Committee recommends that the Attorney General issue a new directive on disclosure, based upon the following recommendations and principles.

Purpose and General Principles of Disclosure

1. *The purpose of disclosure is to assist in guaranteeing the accused's com mon law and constitutional rights to a fair trial and to make full answer and defence.*

2. *Timely and full disclosure by Crown counsel, when diligently utilized by the defence, benefits both the accused and the administration of justice as a whole. Among the benefits are:*

(a) *the resolution of non-contentious and time-consuming issues in advance of the preliminary hearing or the trial, which ensures the most efficient use of court time;*

(b) *the waiver or shortening of preliminary hearings and the shortening of trials; and*

(c) *early resolution of cases, including, where appropriate, the entry of pleas of guilty or the withdrawal of charges.*

3. *The governing principle is that Crown counsel is under a duty to disclose all information in his or her possession relevant to the guilt or innocence of the accused, unless the information is excluded from disclosure by a legal privilege. Crown counsel's duty to disclose any relevant information in his or her possession, whether favourable or unfavourable to the accused, extends to any information which is not clearly irrelevant. All decisions by Crown counsel not to disclose on grounds of either privilege or relevance are reviewable by the trial judge.*

4. *Part of Crown counsel's obligation to disclose all relevant information in his or her possession includes the disclosure of information in his or her possession which is relevant to the prosecution's case, thus enabling the accused to know the case that he or she must meet. Crown counsel must not withhold such information for the purpose of cross-examining on it. This paragraph does not require pre-trial disclosure of reply evidence tendered by Crown counsel in response to issues raised by the accused at trial where the relevance of that evidence first becomes apparent during the course of the trial itself.*

5. *Crown counsel's obligation to disclose is a continuing one and disclosure of additional relevant information must be made when it is received. Even after conviction, including after any appeals have been decided or the time for appealing has lapsed, Crown counsel must disclose information which he or she realizes shows an accused is innocent or which raises a doubt as to the accused's guilt.*

6. *An accused is entitled to disclosure, but where an accused is represented by counsel this right is triggered by a request for disclosure made by counsel. It is recommended that such disclosure requests be made in writing. Where there has been a timely request by defence counsel, disclosure must be made before plea or election. Defence counsel who wish disclosure have a responsibility to make a timely request for it. Where the request is not timely, disclosure must be made as soon as reasonably practical and, in any event, before trial. However, even in the absence of a request, Crown counsel must specifically advise the defence before trial, whether the accused is represented or not, of any information in his or her possession that is obviously exculpatory or which Crown counsel realizes is exculpatory of the accused. Disclosure must be provided or waived prior to any resolution discussions.*

7. *Where the accused is not represented by counsel, the Court or Crown counsel must inform the accused of the right to disclosure and how to*

obtain it. The accused should be advised of the right to disclosure and how to obtain it as soon as he or she indicates an intention to proceed

unrepresented. Unless the unrepresented accused clearly indicates that he or she does not wish disclosure, it must be provided before plea or election, so as to enable the accused sufficient time before plea or election to consider the information disclosed. Disclosure must be provided or waived prior to any resolution discussions.

8. *Crown counsel has a discretion, reviewable by the trial judge:*

(a) *to withhold disclosure where he or she has reasonable cause to believe withholding is necessary to preserve the identity of an informant, to preserve the solicitor-client privilege, or to preserve investigation techniques; and*

(b) *to delay disclosure where he or she has reasonable cause to believe delay is necessary to protect the safety or security, which includes protection from harassment, of persons who have supplied information to the Crown, or to complete an investigation. Any delays in disclosure to complete the investigation should, however, be rare.*

9. ***(a)*** *Defence counsel should not leave disclosure material in the unsupervised possession of an accused person.*

(b) *An unrepresented accused is entitled to the same disclosure as the represented accused. However, if there are reasonable grounds for concern that leaving disclosure material with the unrepresented accused would jeopardize the safety, security, privacy interests, or result in the harassment of any person, Crown counsel may provide disclosure by means of controlled and supervised, yet adequate and private, access to the disclosure materials. Incarcerated, unrepresented accused persons are entitled to adequate and private access to disclosure materials under the control and supervision of custodial authorities. Crown counsel shall inform the unrepresented accused, in writing, of the appropriate uses and limits upon the use of the disclosure materials.*

10. *Dialogue between Crown and defence counsel before and after disclosure, and, in any event, prior to setting a date for preliminary inquiry or trial, is strongly encouraged. Crown counsel and defence counsel, as officers of the Court, will usually be able to resolve disputes with respect to disclosure. If they are unable to resolve a dispute, the trial judge must resolve it.*

11. *The principle of disclosure applies to prosecutions for indictable offences, summary conviction offences and prosecutions under the* Provincial Offences Act. *In all such prosecutions, the Crown, or the private prosecutor, is required to provide complete disclosure in accordance with these recommendations, save where they are inapplicable.*

Particular Requirements

12. *The accused, pursuant to the foregoing principles, is entitled to complete disclosure. Without limiting the generality of the foregoing, the Crown is required to provide the following information in its possession unless clearly irrelevant:*

(a) *a copy of the charge or charges contained in the information and indictment;*

(b) *an accurate synopsis of the circumstances of the offence alleged to have been committed by the accused, as prepared by the investigating agency;*

(c) *All statements obtained from persons who have provided relevant information to the authorities should be produced, even though Crown counsel does not propose to call them as witnesses. Statements of any co-accused (whether made to a person in authority or not) should also be produced. Crown counsel shall provide to the accused:*

(i) *copies of any written statements;*

(ii) *copies of any will-say summaries of anticipated evidence, and copies of the investigator's notes or reports from which they are prepared, if such notes or reports exist;*

(iii) *a reasonable opportunity, in private, to view and listen to the original or a copy of any audio or video recordings of any statements made by a potential witness other than the accused. This does not preclude Crown counsel, in his or her discretion, from providing copies of any video or audio recording or a transcript thereof, where available;*

(iv) *Where statements or recordings do not exist, copies of the investigator's notes, in relation to the persons who have provided relevant information to the authorities, must be provided. If there are no notes, then all relevant*

information in the possession of Crown counsel that the person could give should be supplied, subject to Crown counsel's discretion to delay disclosure.

(v) *In addition to the foregoing, Crown counsel may, upon request by the defence, also provide the name, address, and occupation of any person who has relevant information to give, subject to Crown counsel's discretion to delay such disclosure.*

(vi) *Any discretion exercised by the Crown with respect to disclosure of the foregoing is reviewable by the trial judge.*

(d) *information regarding the criminal record of the accused and any co-accused;*

(e) *a copy of any written statement made by the accused to a person in authority, and, in the case of verbal statements, an accurate account of the statement attributed to the accused and copies of any investigator's notes in relation thereto, and a copy of, and a reasonable opportunity to view and listen to, any original video or audio recorded statement of the accused to a person in authority. All such statements or access thereto must be provided whether or not they are intended to be introduced in evidence.*

(f) *a copy of any police occurrence reports and any supplementary reports;*

(g) *as soon as available, copies of any forensic, medical, and laboratory reports which relate to the offence, including all adverse reports, except to the extent that they may contain irrelevant or privileged information;*

(h) *where reasonably capable of reproduction, and where Crown counsel intends to introduce them into evidence, copies of documents, photographs, audio or video recordings of anything other than a statement by a person, and other materials should normally be supplied to the defence. The defence may be limited to a reasonable opportunity, in private, to view and listen to a copy of any audio or video recording where Crown Counsel has reasonable cause to believe that there exists a reasonable privacy or security interest of the victim(s) or witness(es), or any other reasonable public interest, which cannot be satisfied by an appropriate undertaking from defence counsel.*

(i) *a copy of any search warrant relied upon by the Crown, the information in support, and a list of items seized thereunder, if any;*

(j) *if intercepted private communications will be tendered, a copy of the judicial authorization under which the private communications were intercepted;*

(k) *an appropriate opportunity to inspect any relevant items seized or acquired during the investigation of the offence which remain in the possession of the investigators, whether or not Crown counsel intends to introduce them as exhibits in court;*

(l) *upon request, information regarding criminal records of material Crown or defence witnesses that is relevant to credibility;*

(m) *upon request, any information in the possession of Crown counsel, for example, information regarding outstanding criminal charges or criminal convictions demonstrated to be relevant to the defence; and*

(n) *where identity is in issue, and the Crown relies in whole or in part on the visual identification of the accused as the person seen in the circumstances of the crime, all information in the possession of Crown counsel that has a bearing on the reliability of the identification must be disclosed to the accused.*

13. *Crown counsel is required to disclose any information in his or her possession relevant to the credibility of any proposed Crown witness. Without limiting the generality of the foregoing, Crown counsel is required, for example, to disclose:*

(a) *any prior inconsistent statements or subsequent recantations of that person;*

(b) *particulars of any promise of immunity or assistance given to that person with respect to a pending charge, bail, or sentence, or any other benefit or advantage given; and*

(c) *any mental disorder from which that person is suffering that may be relevant to the reliability of his or her evidence.*

14. *Subject to Crown counsel's discretion as to relevance, which is reviewable by the trial judge, counsel on behalf of the accused or an unrepresented accused may, upon request, inspect the investigative agency's file*

in relation to the offence. The defence should, where possible, particularize their request to assist Crown counsel in exercising their discretion as to the relevance of undisclosed information in the investigative file. Any dispute arising from such a request should usually be resolved in discussions between Crown and defence counsel. This recommendation does not preclude Crown counsel from limiting the defence to access to photocopies of the file material wherever necessary to preserve the integrity of the originals, for example, where editing the originals would destroy their integrity, or taking other reasonable steps necessary to protect:

(a) *the safety, security or freedom from harassment of people who have provided information to the Crown;*

(b) *the informer privilege;*

(c) *any other privilege; or*

(d) *on-going police investigations or investigative techniques.*

15. *Crown counsel generally need not disclose any internal Crown counsel notes, memoranda, correspondence, or legal opinions. Where, however, Crown counsel learns of additional relevant information in the course of interviewing Crown witnesses, defence counsel or an unrepresented accused should be advised of that information as soon thereafter as practicable.*

16. *Crown counsel shall advise the defence of any decision made not to disclose information in his or her possession that should otherwise be disclosed, and the importance of that information. Crown counsel shall also advise the defence of the specific nature of the information in his or her possession which is not disclosed, unless disclosure of the nature of the information withheld would reveal the identity of an informer, jeopardize anyone's safety or security or subject them to harassment, compromise an on-going investigation, or reveal police investigative techniques. Upon request Crown counsel shall take any other steps reasonably necessary to facilitate a review by the trial judge of any decision not to disclose.*

17. *Nothing herein precludes defence counsel from making further requests to Crown counsel for disclosure of information in the possession of Crown counsel or the investigating authorities. Defence and Crown counsel are strongly encouraged to narrow and define the issues to assist Crown counsel in determining whether information is relevant.*

18. *Information in the possession of bodies, such as boards, social agencies,*

and other governmental departments, is not in the possession of Crown counsel or the investigating agency for disclosure purposes. Where Crown counsel receive requests for information not in their possession or the possession of the investigative agency, the defence should be so advised in a timely manner in order that they may take such other steps to obtain the information as they see fit.

19. *The Crown may, in its discretion, require written acknowledgement from defence counsel or an unrepresented accused of disclosure received.*

20. *Where the names and addresses of witnesses are supplied to the defence by the Crown or investigative agency, the witnesses may be informed that there is no property in a witness and that the defence is entitled to interview them, but that they are not required to grant an interview: it is strictly their decision. Care must be taken, however, to ensure that the witnesses are not left with the impression that they should not grant the defence an interview. There should be a standard form of providing this advice where it is given.*

Implementing Disclosure

42. The Committee recommends that the Solicitor General co-ordinate with federal authorities and that both issue such directives as are necessary, to require all police forces operating within the province of Ontario to be aware of and comply with the Attorney General's directive on disclosure in their relations with Crown prosecutors. These directives should also make clear that the police and other investigators

(a) are bound to exercise reasonable skill and diligence in discovering all relevant information, even though such information may be favourable to the accused;

(b) are under a duty to report to the officer in charge or to Crown counsel all relevant information of which they are aware, including information favourable to an accused, in order that Crown counsel may discharge the duty to make full disclosure; and that

(c) a failure to disclose all relevant information as required is a disciplinary offence.

43. The Committee recommends that the police should bear all production costs including labour, equipment, and material costs associated with the preparation and delivery to the Crown of the Crown Brief, photographs, and other exhibits or material used in the prosecution of a case in court. The Ministry of the Attorney General will bear the actual material costs needed to produce sec-

ond or subsequent copies of Crown Briefs intended for disclosure purposes to defence counsel or to the accused person.

44. The Committee recommends that an accused person should not have to pay for basic disclosure.

Disclosure and Accused Persons in Custody

45. The Committee recommends that the Attorney General recommend to Cabinet and the federal Minister responsible for penitentiaries that procedures and facilities be set up for controlling disclosure materials for accused who are in custody while, at the same time, providing the accused supervised, yet full and private, access to these materials.

RESOLUTION DISCUSSIONS

46. The Committee is of the opinion that resolution discussions are an essential part of the criminal justice system in Ontario, and, when properly conducted, benefit not only the accused, but also victims, witnesses, counsel, and the administration of justice generally.

Recommendations Relating to the Conduct of Resolution Discussions

47. The Committee recommends that Crown counsel should not accept a plea of guilty to a charge where he or she knows that the accused is innocent.

48. Where Crown counsel knows that the prosecution will never be able to prove a material element of the case, Crown counsel has a duty to disclose this to the defence.

49. The Committee recommends that Crown counsel can accept a plea of guilty where he or she is aware that the prosecution will never be able to prove a material element of the offence provided this state of affairs is fully disclosed to the defence.

50. The Committee recommends that the Attorney General should require all of his or her agents conducting resolution discussions to ensure that the Crown's position on sentence not be formulated simply for reasons of expediency, and not otherwise bring the administration of justice into disrepute.

51. The Committee recommends that the Attorney General should require his or her agents conducting resolution discussions to consider the interests of

victims. The Attorney General should require his or her agents conducting resolution discussions to consult with any victims, where appropriate and feasible, prior to concluding such discussions.

52. The Committee recommends that the Attorney General emphasize to his or her agents that a plea of guilty is a circumstance in mitigation of sentence, and when the plea of guilty is offered at the first reasonable opportunity it is particularly mitigating.

53. The Committee recommends that, as a general rule, counsel must honour all agreements reached after resolution discussions. However, on rare occasions, it is appropriate for senior Crown counsel, after reviewing an agreement made by the Crown, to repudiate that agreement if the accused can be restored to his or her original position, and if the agreement would bring the administration of justice into disrepute.

Recommendations Concerning Courtroom Practice Following Resolution Discussions

54. The Committee recommends that, as a general rule, open to some exceptions, Crown counsel should state on the record in open court that resolution discussions have been held and that an agreement has been reached.

55. The Committee recommends that where a plea of guilty is entered, the trial judge should question the accused to ensure:

(a) that they appreciate the nature and consequence of a plea of guilty;

(b) that the plea is voluntarily made; and

(c) that they understand that an agreement between the Crown prosecutor and defence counsel does not bind the court.

56. The Committee recommends that the Attorney General seek an amendment to the *Criminal Code* requiring a sentencing judge to question the accused as set out above, whether the accused is represented by counsel or not.

57. The Committee recommends that it is improper for the Crown to withhold from the Court any relevant information in order to facilitate a guilty plea. In cases where not all matters are admitted, the Crown should advise the Court of the allegations and then proceed upon the admitted facts. In such cases, the Court will sentence on the admitted facts only.

58. The Committee is of the opinion that a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest.

59. The Committee observes that Crown counsel at trial cannot bind the Attorney General's discretion to appeal. The Committee recommends that where Crown counsel at trial agrees to a joint submission which the sentencing judge accepts, the Attorney General should appeal only where the sentence is so wrong as to bring the administration of justice into disrepute.

Procedural Aspects of Resolution Discussions

60. The Committee is of the opinion that Crown and defence counsel have a professional obligation to meet prior to trial where appropriate to resolve issues. The Committee is of the opinion that both Crown and defence counsel have a professional obligation to act responsibly in arranging meetings and responding to initiatives aimed at resolving criminal cases as early as possible. This will reduce demand for court time and ensure that court time scheduled is used efficiently.

61. The Committee recommends that, apart from cases in which the accused is in custody, or lengthy or complex cases, the Attorney General should require the completion of disclosure and the conduct of resolution discussions before the setting of a date for a preliminary hearing or trial.

62. The Committee recommends that, absent exceptional circumstances, there should not be resolution discussions at the trial courtroom door rather than at an earlier stage in the proceedings.

Pre-Hearing Conferences

63. The Committee endorses pre-hearing conferences as a very useful and necessary aspect of the administration of criminal justice in Ontario. Participation by the judiciary in pre-hearing conferences is, in the Committee's view, both proper and just, and can contribute greatly to the early and fair resolution of many cases. The Committee encourages the judiciary to convene and participate in such conferences where appropriate.

64. The Committee recognizes that the procedure for conducting pre-hearing conferences varies throughout the province depending on local circumstances. The Committee supports this sensitivity to local conditions, and recommends that there be no uniform and province-wide manner of conducting pre-hearing conferences put in place. The Committee does, however, endorse some basic principles as necessary for an effective pre-hearing conference.

65. The Committee recommends that a pre-hearing conference should not take place until disclosure has been either obtained or waived.

66. The Committee recommends that a pre-hearing conference should take place as soon as possible after all participating counsel have had a reasonable opportunity after disclosure to familiarize themselves with the particular case.

67. The Committee recommends that all counsel participating in the pre-hearing conference must be fully familiar with the case, and must be in a position to make admissions or agreements on behalf of the Crown or the client, as the case may be.

68. The Committee recognizes that it is always open to the presiding judge, for reasons which seem sufficient to that judge, to record part or all of a pre-hearing conference.

69. The Committee recommends that any agreement reached, or position taken (such as decisions on admissibility of evidence, or what *Charter* issues will be raised), excluding any position taken on the issue of sentence, should be recorded in writing by the pre-hearing conference judge.

70. The Committee recommends that a pre-hearing conference may cover the entire range of issues in a case, including plea and sentence.

71. The Committee recommends that the pre-hearing conference must be scheduled so as to allow sufficient time to fully discuss the case.

72. The Committee recommends that all parties participating in a pre-hearing conference must be afforded a fair opportunity to state their positions and participate in the discussions.

73. The Committee is of the opinion that a judge presiding at a pre-hearing conference should not be involved in plea bargaining in the sense of bartering to determine the sentence, or pressuring any counsel to change their position. The presiding judge may, however, assist in resolving the issue of sentence by expressing an opinion as to whether a proposed sentence is too high, too low, or within an appropriate range.

74. The Committee recommends that if everyone is agreed on the suggested range of sentence, and is content with the practice, there is no difficulty with the pre-hearing judge going on to hear the plea of guilty. However, the pre-hearing judge should not hear the plea of guilty, or any contested proceedings in the same prosecution other than adjournments or attendances to set dates, unless all parties consent.

75. The Committee recommends that, during a plea and sentencing following a pre-hearing conference, it is important to create a full record in open court, including sufficient detail about the circumstances of the offence, the offender, and, where appropriate, the victim.

76. The Committee recommends that the Attorney General request of the federal government that s. 625.1 of the *Criminal Code* be amended to read as follows:

> **625.1** **(1)** Subject to subsection 2, on application by the prosecutor or the accused or on its own motion, the court before which, or the judge, provincial court judge or justice before whom, any proceedings are to be held, may order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by the court, a judge, or a provincial court judge or justice, be held prior to the proceedings to consider such matters as will promote a fair and expeditious hearing, including, where just and appropriate, final resolution of the charges in issue in the proceedings. The judge, provincial court judge or justice who presides over such a conference shall not preside over the trial, a plea of guilty, or any contested proceeding other than adjournments or attendances to set dates in the same matter without the consent of the prosecutor and the accused.
>
> **(2)** In any case to be tried with a jury, a judge of the court before which the accused is to be tried shall, prior to the trial, order that a conference between the prosecutor and the accused or counsel for the accused, to be presided over by a judge of that court, be held in accordance with the rules of court made under section 482 to consider such matters as will promote a fair and expeditious hearing, including, where just and appropriate, final resolution of the charges in issue in the case.

77. The Committee is of the view that, absent exceptional circumstances, it is inappropriate to engage in resolution discussions with the trial judge in Chambers.

78. The Committee is of the view that, as a general rule, open to some exceptions, any resolution discussions that do take place with the trial judge in Chambers should be recorded.

79. The Committee recommends that the Attorney General issue such public guidelines as are appropriate to implement the Committee's recommendations with respect to resolution discussions.

CONCLUDING RECOMMENDATION

80. The Committee recommends that the Solicitor General and the Attorney General take appropriate steps and commit sufficient resources to provide instruction, training, and continuing education for police officers and Crown counsel as to the Committee's recommendations and views.